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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

SUPERIOR OIL COMPANY, Appellant.

Vs.

MISSISSIPPI, EX REL,

GEORGE T. MITCHELL, Attorney General,

Appellee.

NO. 28

REPLY BRIEF FOR APPELLANT.

W. H. WATKINS,
JOHN L. HEISS,
W. LEE GUICE,
Counsel for Appellant.

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Appellee.

NO. 28

REPLY BRIEF FOR APPELLANT.

We shall make no reply to the statement of facts set out by the appellee in-as-much as this statement seems to be merely a re-statement of the statement of fact of the opinion of the Supreme Court of Mississippi as it is set out in 119 Sou. Rep. page 360, except that we want to call to the court's attention that the appellee has added to its statement by the inclusion of certain parts of the evidence which it attempts to set out verbatim, the purpose of which we cannot under-

stand unless it is an effort to call to the court's attention that part of the evidence which the appellee thinks most favorable to its contention; however, while this testimony is incomplete in itself, it itself shows facts which would justify the finding of all of the courts which have considered this matter that unquestionably the gasoline, the basis of this case, was moved in interstate commerce, as for instance the following finding set out in the official opinion of the Supreme Court of Mississippi in which it decided the case against the appellant: "The question is not whether the gasoline moved in interstate commerce, for there is no dispute about that. It moved from Biloxi, in this state, to a point near Grants Pass in Louisiana. And, under the evidence at the time the gasoline was purchased, it was intended by the purchaser for that identical interstate commerce."

ARGUMENT.

In the beginning we wish to call to the court's attention that the appellee admits:

FIRST.

The jurisdiction of this court.

SECOND.

That this court will examine the record and determine for itself whether or not the Mississippi statute complained of, as construed and enforced by the Supreme Court of Mississippi, burdens interstate commerce.

THIRD.

That a state cannot under the commerce clause of the Constitution of the United States tax interstate commerce.

The appellee, however, denies that the sale and delivery of gasoline by appellant in this case according to the established course of dealing was in a regular channel of inter-- state commerce and formed an integral part thereof.

We must here call to the court's attention that the Supreme Court of Mississippi in the paragraph quoted above, admitted that the sale of gasoline in the case at bar was for the purpose of interstate commerce, and it admitted that the gasoline immediately moved in interstate commerce, and the appellee, while it challenges the theory upon which the Supreme Court of the State of Mississippi decided this case, does not challenge these facts or this finding of fact by the Supreme Court.

It challenges the theory adopted by the Supreme Court that the case involved the question of whether or not the the bill of lading used herein was a valid bill of lading or merely a useless or unnecessary receipt as was decided by the Supreme Court of the State of Mississippi but it does not deny that from the minute the gasoline was purchased that at once a series of physical acts were performed by all the parties interested in the gasoline which resulted in the transportation of the gasoline through the streets of the City of Biloxi onto the decks of the schooner and from thence over a great public waterway to a destination in a sister state, and it does not challenge the fact that the purpose of the sale was that such transportation might take place.

The appellee seems to have adopted the following theory: That in-as-much as goods brought into a state cease

to have the interstate character protected by the commerce clause after they have come to rest in a state, that the converse of this would be true and the goods would not take on an interstate character until after purchase and delivery had taken place, and therefore after the title passed to the packers at Biloxi, Mississippi, in trust for the man in Louisiana that the Superior Oil Company, the appellant, passed as one of the parties to the interstate commerce transaction.

Before taking up the argument as to this contention, we want to present to the court the thought that none of the cases cited by the appellee in its points numbered from one to six even slightly resemble the facts in the case at bar or should be governed by the same rule of law. Taking up the cases in the order that they are cited we bring them to the attention of the court as follows:

Sonneborn Brothers v. Keeling, Attorney General, 262 U. S. 506, 67 L. Ed. 1095, 43 Sup. Ct. Rep. 643; was a case where the State of Texas was attempting to recover a license or charge levied against the sale of gasoline in the State of Texas. This gasoline had been shipped from a sister state into Texas. It had come to rest in the warehouse of Sonneborn Brothers in Texas. It was then by Sonneborn Brothers sold in intra-state commerce in Texas and in all the facts of the case there was no suggestion of the invalidity of the tax because the article had been exported from Texas, but on the contrary, the law's validity was attacked because the article had been imported into Texas and all the court decided was that this protection of the com-

merce clause ceased when the goods came to rest in the state of their destination. It involved no question of outgoing commerce.

Bowman v. Continental Oil Company, 256 U. S. 642, 65 L. Ed. 1139, 41 Sup. Ct. Rep. 606: This case is almost identical with the Sonneborn case. The gasoline was brought into one state from another state. This court held that as to the gasoline sold within the state after the same became a part of the general property of the Oil Company in the state that it was taxable, but as to that part which shows commerce coming within the state from without the state with all the usual elements of interstate commerce was not taxable; however, the court did not have before it any question of commerce from within to without the state.

Askren v. Continental Oil Company, 252 U. S. 444, 64 L. Ed. 654, 40 Sup. Ct. Rep. 355: This case is a companion case of *Bowman v. Continental Oil Company*. The facts are the same and no question was here raised that was analagous to the question at issue in this case.

Banker Brothers v. Pennsylvania, 222 U. S. 210, 56 L. Ed. 168, 32 Sup. Ct. Rep. 38: This was the case where automobiles were purchased in New York and brought to Pennsylvania and placed in the place of business of Banker Brothers. Later they were sold to various persons, also residents of Pennsylvania, and Banker Brothers attempted to escape a Pennsylvania tax for the sole reason that at one time the automobiles were shipped from Buffalo, New York, to Pittsburgh, Pennsylvania. However, the court held

that the transaction was purely an intra-state transaction in that the automobiles had lost all claim to protection of the interstate commerce clause upon their delivery to Banker Brothers in Pittsburgh, and thereafter were subject to the same tax that any other property in the state was subject to. That the mere fact of their manufacture outside of the state did not protect them under the commerce clause. In this case there was absolutely no element of interstate commerce and no suggestion of a question of commerce from within Pennsylvania to a point without that state.

Kehrer v. Stewart, 197 U. S. 60, 49 L. Ed. 663, 25 Sup. Ct. Rep. 403: This case was a case where a butcher attempted to escape liability for a privilege tax because his meat was shipped from Chicago, but after reaching Atlanta a large part was sold to the trade generally in and about Atlanta. No part of it was shown to have afterwards been shipped out of the state in interstate commerce and there was no question involved of outgoing interstate commerce, the sole question being the claim of a freedom from the tax because of the origin of the goods. However, the court decided that the goods having reached their destination and a situs being obtained in Georgia that the dealing in same was taxable.

Pierce Oil Corporation v. Hopkis, 264 U. S. 137, 68 L. Ed. 593, 44 Sup. Ct. Rep. 251: The only question involved in the above case was one with reference to the Fourteenth Amendment. No question of interstate commerce was involved and we are making no claim that the State of Mississippi does not have a right to, without discrimination, levy a tax on sales in intra-state commerce.

LaCoste v. Department of Conservation, 263 U. S. 545, 68 L. Ed. 437, 44 Sup. Ct. Rep. 186: This case was one with reference to the collection of a severance tax on animals owned by the State of Louisiana in their wild state, while the skins of these animals were in the possession of one LaCoste. The tax was on the severance and not on the sale. There was nothing in the record to show that LaCoste had started them into any channel of commerce or that he was possessed of orders that would have laid the goods taxed into the channels of interstate commerce. The sole question of interstate commerce involved in the case was a claim that he intended to dispose of them in interstate commerce. This, Your Honors, disallowed, holding that an intention to send goods into the channels of interstate commerce is not sufficient to deprive the state of its right to tax the article and that therefore they are not protected by the commerce clause. There was not any sale or delivery to a private or public carrier shown in the record.

State Tax on Railway Gross Receipts, 15 Wall. 284, 21 L. Ed. 164: This case was one involving the right of a state to tax the gross receipts of Railway Companies, regardless of the nature of the commerce from which these receipts originated. It has no application to the case at bar, and the opinion rendered by the court has been explained away in many decisions of the court so that at this time it is without authority as to whether or not commerce of the kind shown in the record in this case can be taxed. The case was distinguished and its value as a precedent lessened in the following cases:

Fargo v. Michigan, 121 U. S. 242, 30 L. Ed. 893, 7 Sup. Ct. Rep. 861, holding state tax upon gross receipts of interstate railroads void; *Western Union Tel. Co. v. Alabama State Board*, 132 U. S. 475, 33 L. Ed. 410, 10 Sup. Ct. Rep. 1362, tax imposed upon gross receipts from messages carried partly within and partly without State is void; *Indiana v. American Express Co.*, 7 Biss. 230, Fed. Cas. 7021, State can not impose tax upon receipts of foreign corporation for transportation of merchandise received and delivered out of State; *State v. Pullman Palace Car Co.*, 11 Biss. 566, 16 Fed. 200, State tax on gross receipts of foreign sleeping-car company, invalid; *Frere v. Von Schoeler*, 47 La. Ann. 327, 27 L. R. A. 415, 16 Sou. 810, license explicitly laying charge upon towboats for privilege of navigating river between Gulf of Mexico and New Orleans void; *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. 338, 340, 342, 345, 30 L. Ed. 1202, 1203, 1204, 7 Sup. Ct. Rep. 1121, 1122, 1124, holding State tax upon gross receipts of steamship company engaged in interstate and foreign commerce, void.

Woodruff v. Parham, 8. Wall. (U. S.) 123, 19 L. Ed. 382: This is one of the earlier cases holding that the mere fact that goods were imported into a state from another state does not make them tax free after they have been delivered to the consumee. An auctioneer in Mobile had received varied merchandise from points without the state for the purpose of selling it at public auction in Mobile. The sole question decided was that the commerce clause did not protect him to the extent that he was free from the duty to pay a license merely because the goods he was selling in

Alabama to people in Alabama had originated from without the state. There was no question of facts presented similar to or resembling in the slightest the question presented in this record.

We therefore call to the court's attention the above cases for the purpose of demonstrating that none of the authorities cited by the appellee in anywise bear on the question at issue in this case and having, as we believe, explained these cases, we now submit to the court the following answer to the argument advanced in the brief of appellee:

ANSWER TO ARGUMENT OF ALL POINTS ADVANCED BY APPELLEE.

The appellee, as far as we can gain from its brief, attempts to present to this court the fact that although the gasoline in the case at bar moved in interstate commerce, and although when it was sold it was the intention of the parties that it should commence this journey, that the State of Mississippi still retains its power to tax this commerce for the following three reasons:

1.

Because the gasoline was sold and afterwards paid for in the State of Mississippi.

2.

Because the bill of lading issued by the schooner was issued by the master of a boat owned by the one who paid for the gasoline.

3.

Because the gasoline was shipped out of the State of Mississippi on a boat which was not in all respects a common carrier, using the word common carrier in the strictest definition given it, that is, railroad or steamship lines devoted exclusively to the transportation of freight and passengers.

In the beginning of our argument we shall again call to the court's attention that none of the cases cited by appellee in anywise bear out its contention with reference to any of the above three points for the reason that no question analagous to the above questions presented itself in any of the cases. Each case cited, except *LaCoste v. Conservation Department of Louisiana,* embraced a transaction where property came from without the state to a point within the state, obtained a situs there and was afterwards sold in intra-state commerce, and in the LaCoste case the point involved was whether or not the commerce clause attaches merely because of an attempt to afterwards deal in interstate commerce. However, in the case at bar, the Supreme Court of the State of Mississippi, in its findings of fact, admits that no question existed but that the gasoline was shipped across the state line and that furthermore when it was purchased the intention was to so make this shipment.

Arguing on the first point raised by the appellee, we call to the court's attention the many, many times that this court has held that it does not construe commerce in any restricted sense, that under its construction commerce is

something more than transportation, that commerce means intercourse and embraces the sale, as well as the transportation, and although the appellee has contended that this definition applies to cases other than tax cases, we submit that this is the firm ground upon which this court has extended the protection of the commerce clause to all classes of litigants whether the question involved is a tax or not. Therefore, the question as to what constitutes commerce, or rather interstate commerce, is not what was the residence of the parties to the original transaction, but what was the nature and purpose of the sale and the after acts with reference to the article sold. We call to the court's attention here, the case of *DiSanto v. Pennyslvania,* 273 U. S. 34; 71 L. Ed. 524, cited on page 13 of our original brief. In this case DiSanto lived in Pennsylvania and he sold a ticket to a man in Pennsylvania, however, the sole purpose of the sale of the ticket was that it might transport the man across the borders of the State of Pennsylvania into a foreign country. While the people were then residents of Pennsylvania, the subject matter of the sale had exclusive reference to commerce going without the state and the court unhesitatingly held that a tax on this commerce could not be upheld.

In *Spaulding v. Edwards,* 262 U. S. 261; 67 L. Ed. 865, the sale of the goods was consummated in New York between two citizens of New York and the title passed in New York; however, even as the packing company in Biloxi acted for a fisherman in Louisiana, one of the parties in New York acted for a principal in a foreign country and the goods were immediately delivered for transportation to a foreign

country, even as the goods in this case immediately after the sale were delivered to a schooner for transportation to a different state, and although the tax in this case was one that would be upheld with reference to a transaction wholly taking place in New York, the court refused to allow it to be sustained as against the sale of the goods which were afterwards transported in interstate commerce.

With the exception of the fact that the goods in the Spaulding case were delivered to a steamship line and transported to a foreign country, the case is absolutely analagous to the case at bar. In the case at bar, we have a fisherman in Louisiana ordering gasoline from a factory-man in Biloxi. In the Spaulding case, a man in a foreign country ordered certain goods from his agent in New York. In the case at bar, the factory owner at Biloxi immediately ordered the delivery of these goods to the only means of transportation possible, a schooner. The goods were so delivered and a bill of lading signed. In the Spaulding case, the agent immediately purchased the goods and ordered them delivered to a steamship line and they were so delivered. In the case at bar, the gasoline without question was at once transported to Louisiana and delivered to the man who had requisitioned it, and in the Spaulding case, the goods were immediately shipped by steamship to a foreign country and delivered to the man who ordered them. The facts are identical, and if the transaction of the Spaulding case was interstate commerce protected as such by the commerce clause, certainly the same rule would apply in the case at bar, and we respectfully submit that if there was no case heretofore decided involving this question by this Honorable

Court, except the case of *Spaulding v. Edwards,* that this would be overwhelming authority in support of the contention of the appellants.

Everything that a man does must have a beginning and an ending. For instance, a man is born, lives his life and afterwards dies. He takes a journey and when it is concluded reaches a destination or returns home. He enters into a public office and at the expiration of his term retires. Likewise, in commerce there is a beginning and an ending of it. No logic, whether legal or otherwise could possibly set the beginning point at any place other than contract of sale and this court has in every pronouncement made by it said that the beginning of a transaction in interstate commerce was the sale, even as by the authorities quoted by the appellee it has held that the ending was the delivery and the coming to rest of the property at its point of destination, and the mere fact that there might be some diversion of the goods after the sale, when as a matter of fact there was not such diversion, does not prevent the entire transaction from being interstate commerce.

We call to the court's attention the following cases as absolutely sustaining this answer to the appellees argument on the points above considered: *Danke-Walker Milling Co. v. Bondurant,* 257 U. S. 282; 66 L. Ed. 239; *Lemke v. Farmers Grain Co.,* 258 U. S. 50; 66 L. Ed. 458; *Texas & N. O. Railway Co. vs. Sabine Tram. Com.,* 227 U. S. 111, 57 L. Ed. 442; *Foster-Fountain Packing Co. v. Haydel,* 73 L. Ed. 1; *Hughes Brothers v. Minn.,* 272 U. S. 469; 71 L. Ed. 359; *Pennsylvania v. West Virginia,* 262 U. S. 553, 67 L. Ed. 1117; *U. S. v. Hill,* 248 U. S. 420, 63 L. Ed. 337.

With reference to the second point that seems to be advanced by the appellee in its brief, that is, that the bill of lading was signed by the master of a boat owned by the one who acted in the purchase of the gasoline, we suggest to the court that if you ignore the bill of lading in this case, you would come to the same conclusion as a bill of lading is not absolutely necessary to constitute a transaction in interstate commerce. It is only one of the incidents to such a transaction but can be ignored for the simple reason that no third person has to act in order to constitute a transaction in interstate commerce between two persons and in fact one person alone by himself can engage in interstate commerce. For this reason we will consider this question along with the third point raised by the appellee, that is, that a different rule applies where a shipment is made by means other than that of a common carrier.

In presenting this question to the court, certainly we have to call to the court's attention the fact that the commerce clause, although it has been great enough to broaden with the advancing ramifications of business and industry in America in such a way as to have protected that advancement probably more than anything else in the history of progress in the United States, still must be viewed as having application to the manner and method that business was conducted at the time when it was first given authority by the adoption of the Constitution of the United States. At that time and for many years afterwards very little, if any, commerce was carried on in these United States by common carriers, considering common carriers within the meaning of the strictest construction placed on same by the appellees.

We had no railroads and very few, if any, ship lines and intercourse between the states and commerce between the states in most cases was carried on wholly by means of instrumentalities furnished by those persons engaging in such commerce, so were we to transport the scene of this question back one hundred twenty-five years, would it not be a ridiculous argument to present to the court that although an article was purchased for transportation without the state and although it was so transported, that the commerce in it was not interstate in nature for the reason that the agent of the man who used it without the state furnished the means of its transportation without the state. In other words, if a man was in Biloxi, Mississippi, and bought a carload of gasoline and shipped it over the Louisville and Nashville Railroad Company to New Orleans, Louisiana, according to the contention of the appellees this would be interstate commerce, but were the same man to make this purchase and immediately load it on a schooner owned by him and carry it to his principal in New Orleans by means of this schooner, this would not constitute such commerce.

We call to the court's attention here the case of *Pan Handle Oil Co. vs. State of Mississippi*, 277 U. S. 218, 72 L. Ed. 857, which was the case that this suit was originally predicated upon. In that case Your Honors expressly held that even though this might be called an excise tax or a tax measured by the gallonage of gasoline sold, that in fact it was a tax upon the sale itself which of necessity must be paid by the one purchasing the article. In other words, while a tax was charged against the Superior Oil Company in the case at bar it would have to be charged of necessity

in the usual business dealings against the fisherman who used this gasoline in the State of Louisiana.

Therefore, taking a view of the whole situation prevailing at the time of the sale of the gasoline we find not only were food, clothing and fuel transported by the only possible means from Biloxi to the fisherman in the southern part of Louisiana, this transportation taking place across the common waterway used by the citizens of all states, but that in return for these articles through the labor of these fishermen there were brought back to Biloxi large quantities of shrimp and other sea foods taken by the labors of these fishermen from the waters of the sister state of Louisiana. Not only does the fact of the sale and transportation of the gasoline in this case show an act of interstate commerce, but this whole transaction is the very essence of that business dealing and intercourse between states which it was the desire of the framers of the Constitution to protect. Here are men who went to Louisiana, they fished in its waters, they brought wealth from these waters, this wealth was transferred to Mississippi and in return we supplied them with some of the means by which they operated the instrumentalities used in this business. Therefore, what difference did it make whether there was a bill of lading or was not a bill of lading, or whether the goods were transported on a boat exclusively devoted to the purpose of a common carrier or not. By what other means could intercourse be carried on between Biloxi and that part of Louisiana called the Louisiana Marsh? The records show that no railroad lines ran there, necessity did not demand any exclusive boat lines there, but from the very necessary conduct of the whole

scheme of commerce existing and of the intercourse between the two states, the boats which brought in catches of shrimp and oysters took out food, gasoline, etc., as is shown by the record. We say that this constitutes commerce in its broadest sense and in-so-far as the sale of the gasoline was concerned there could be no commerce without a beginning and this beginning was the sale.

We refer the court to *U. S. v. Hill*, 248 U. S. 420, in which the court in part says:

> "The transportation of one's own goods from state to state is interstate commerce and as such subject to the regulatory power of Congress."

We find the above holding sustained in the case of *U. S. v. Simpson*, 252 U. S. 465, 64 L. Ed. 665, and in the case of *Kermeyer v. Kansas*, 236 U. S. 568, 59 L. Ed. 721, 35 Sup. Ct. Rep. 419. In the latter case it was held that a man transporting his liquor from one state to another state by means of a horse-drawn vehicle owned by himself was engaging in interstate commerce, although the means that he was using was merely a subterfuge to avoid the restriction of the law of Kansas prohibiting his engaging in business in Kansas. The court in part used the following language:

> "The fact that goods were transported in the owner's conveyance is not conclusive that it is not interstate commerce. Thus, the transportation of oil through various states by means of a pipe line has been held to be interstate commerce, although the oil belonged to the owner of the lines where this oil was purchased by the owner and

was transported for the purpose of being sold. Pipe Line Cases, 234 U. S. 548, 58 L. Ed. 1459, 34 Sup. Ct. Rep. 956."

And, we find that in the case of *U. S. v. Chicago M. & St. P. Railroad Co.*, 149 Fed. 486, that a railroad company engaged in hauling its own rails upon its construction trains across the state line is engaged in interstate commerce.

In *Brooks v. U. S.*, 267 U. S. 432, 69 L. Ed. 699, the court held that interstate transportation by means of a motor vehicle by a person who knew same to be stolen was interstate commerce.

We also call to the court's attention the case of *Flannigan v. Federal Coal Co.*, 267 U. S. 222, 69 L. Ed. 583, which was a case in which the same right to have diverted the shipment as existed in this case, but the court held that this alone could not change the facts shown to be interstate commerce merely because of this power of diversion.

In *Public Utilities Corp. v. Attleboro*, 263 U. S. 83, 71 L. Ed. 549, the court held that the transmission of electricity from one state to another is interstate commerce, although custody and title were transferred from vendor to purchaser at the state boundary.

We therefore respectfully suggest to the court that it is not the means by which an article or person is transported from one state to the other that is decisive of whether or not such transportation is interstate commerce but it is the intention of the parties, the act of transportation and the

purpose to engage in intercourse of some nature with another state which governs, and in the case at bar, from the time the fishermen in Louisiana, as shown by the record, requisitioned said gasoline a chain of circumstances arose, as shown by the record in this case, every one of which was an incident of interstate commerce; the second of these circumstances, that is, the order and sale of the goods by the Superior Oil Company to the packing house, being the most necessary one in the whole chain of circumstances for the consummation of the transaction. There could have been no transportation without a sale; therefore there could have been no interstate commerce in this case without a sale and as this court, in *Pan Handle Oil Co. v. State of Mississippi*, quoted above, held that the tax was directly upon the purchaser of the gasoline under this very law, then the minute the sale was made and the goods were launched into interstate commerce they went forth with the burden of the excessive tax upon them. There is some weak contention made in the brief of the appellee that you can divorce the sale from the transportation, and if you do so you have a case where gasoline is stored in Mississippi and in the usual course of business the owner of the gasoline sells to a packing plant here and thereupon the tax springs into existence; that there is no interstate commerce then but only such commerce after this sale has been consummated and the goods delivered into the hands of the purchaser.

There is no basis for this argument as in passing on what is interstate commerce this court will not judge it by any one incident in the chain of circumstances making it up. There might have been some merit to this contention on the

part of the appellee if the packing company had been in the habit of purchasing large quantities of gasoline, storing it in their warehouses here and later on, at various and divers times, shipping it to Louisiana as the occasion demanded, but in the case at bar there was no such fact. Not only was every circumstance of the sale directly and intimately connected with the transportation which carried it from one state to the other, but there was no pause in the voyage of the oil from the station of the oil company until the time it was delivered to the boats of the fishermen in the waters of Louisiana. There is no suggestion in the record that there was even a thought in the minds of the purchasers or sellers of this gasoline, except that it was going to be immediately transported to the decks of the schooner and by means of the schooner to the waters of Louisiana. It does not matter whether or not the Superior Oil Company had any interest in the gasoline or any right to its control after it was delivered by it on board the schooner. The protection of the commerce clause extends to this corporation as their first dealing in this gasoline was in pursuance of a sale which required them to start the gasoline on an interstate commerce journey and this journey was completed. In *Texas & N. O. R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, the court in part said:

> "The lumber was ordered, manufactured and shipped for export. And we say ship for we regard it of no consequence that the Sabine Company had no concern or connection with it after it reached Sabine. Its relation to the shipper was a perfectly natural one, and did not change the relationship of the power company to it, and make

the lumber other than lumber purchased at Ruliff and started from there in transportation to a foreign destination."

We therefore submit to the court that the facts shown in this record constitute intertsate commerce from the minute that the goods were ordered until the time of the delivery in Louisiana and that for this reason the question of the validity vel non of the bill of lading or of the necessity for it has no bearing on the construction that will be placed by this court on the facts shown in the record. In taking this position, we do not concede that it was not competent for us to contract and to sell gasoline so that while a partial delivery was made here actual title passed in another state, and in support of this contention we cite to the court: *Harkness v. Russell*, 118 U. S. 663, 30 L. Ed. 285; *U. S. v. Woodruff*, 89 U. S. 180, 22 L. Ed. 863; *Beardsley v. Beardsley*, 138 U. S. 262, 34 L. Ed. 928; *Williston on Sales*, Second Edition, Vol. 1, para. 259; *Weston Oil Co. v. Lipscomb*, 244 U. S. 346, 61 L. Ed. 1181.

We therefore say in conclusion that there is no merit in the contention of the appellee that it is the duty of this court to take one continuous transaction and because it can be separated so as to make valid a state tax to separate it. Appellees say that the sale can be separated from the transportation because it is a separate contract. In the *Texas & N. O. R. R. Co. v. Sabine* case, the court could have separated the sale by Sabine Tram. Co. the Powell company but held that it would not separate it because it was a part of a continuous transaction. In the case at bar, the court could separate the sale from the transportation, could separate

the transportation from the delivery, but were it to do so it would announce a doctrine that there could be no interstate commerce unless it consisted of one inseparable act. This is not the law, as decided time after time by Your Honors, but on the contrary every essential detail which enters into a transaction in interstate commerce from the soliciting of the order, the actual making of the sale, the delivery to the transportation company or personal delivery and the actual reception of the goods, if done in continuity together make up a transaction, the whole of which constitutes interstate commerce.

We therefore respectfully suggest that there is nothing either in law or fact shown in the brief of the appellee which in anywise sets aside the overwhelming authorities cited in the original brief of the appellant supporting the contention of the appellant that the sale of the gasoline by the Superior Oil Company was a sale in interstate commerce and if this be true the appellee admits that under the laws of the United States such sale is not taxable, and if the statutes complained of are applied to or so construed as to embrace such a sale or transaction then clearly to this extent the same is unconstitutional.

We respectfully submit that the judgment appealed from should be reversed for the reasons hereinbefore set out.

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